No. 336

In the Supreme Court of the United States

OCTOBER TERM, 1942

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JACKSONVILLE PAPER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

CITATIONS

Cases—Continued. Page

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. —

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JACKSONVILLE PAPER COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Administrator of the Wage and Hour Division, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered May 25, 1942, reversing a decree of the United States District Court for the Southern District of Florida, Jacksonville Division, with instructions to enter a new decree in accordance with the opinion of the Circuit Court of Appeals.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 707–711) are reported in 4

Wage Hour Reporter 444. The opinion of the Circuit Court of Appeals (R. 742–746) is reported in 128 F. (2d) 393.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 25, 1942 (R. 746). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Respondent, a wholesale distributor of paper products, receives large quantities of such products in interstate commerce for purpose of distributing them to its customers. The flow of goods from suppliers in other states through respondent's branch establishments to the customers is large and constant. The question is whether employees of respondent who are engaged in delivering goods from those establishments to customers located in the same state are "engaged in commerce" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act are set forth in the Appendix.

STATEMENT

On July 8, 1940, the Administrator filed a complaint (R. 2–10) against Jacksonville Paper Company alleging that that employer had failed to pay

certain of its employees who were "engaged in commerce" within the meaning of the Fair Labor Standards Act the compensation required by Sections 6 and 7 and had otherwise violated the Act.[1] The complaint sought an injunction against further violations (R. 9). In its answer (R. 23-25) respondent alleged that many of its employees were not subject to the Act and that it was complying with the statutory requirements as to those employees who were covered. At a pretrial conference held on April 15, 1941, it was admitted that respondent had not complied with Sections 6, 7, 11 (c), and 15 (a) (1) with respect to any of the employees at seven of its twelve branch establishments (R. 38).

The facts, as shown by the evidence, may be summarized as follows: respondent is engaged in the business of purchasing, selling, and distributing at wholesale paper products and related articles. It is the largest such distributor in the area served, which includes the States of Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and the Island of Nassau (R. 689–705). During 1940 respondent's gross sales totaled

[1] The complaint also named as defendants and alleged violations by certain co-partners doing business as Southern Industries Company (R. 2). The injunction (R. 712–715) issued by the District Court against these defendants was reversed by the Circuit Court of Appeals on a ground (R. 745) which is not challenged here. No question concerning Southern Industries Company is raised in this petition.

$3,206,041 (R. 698–699).[2] A large variety of paper products, ranging from huge rolls of newsprint to paper cups and napkins, is handled (R. 345, 356–357, 359, 365, 424–425, 429, 436, 592–593).

Respondent is dependent upon the channels of interstate commerce for by far the major portion of the products which it distributes; some 500 mills and other suppliers in various parts of the United States, Canada, and Finland ship their products to respondent (R. 195, 237, 350, 352, 399, 407, 420, 425, 426–427, 433, 435, 595–602, 633, 688–689). The shipments are made from the mills to respondent's twelve branch establishments (R. 240–241, 253, 302–303, 373, 395, 425, 433, 464, 466). The goods move in a constant flow by railroad, steamer, and truck (R. 376, 448, 450–452, 468; see R. 309–311, 338–339). Some of the merchandise is shipped direct from the mills to respondent's customers (R. 376, 379, 382–383, 442–443, 474, 568–569, 633–634, 647, 648–649, 667–668) and some of it, while consigned to the branches, is taken from the steamship pier or freight terminal to the customer's place of business, pausing at the branch establishment only for "checking" of the merchandise (R. 376–377, 379, 453–454, 458–459, 460–461, 614, 671, 680–681). Most frequently, however, the merchan-

[2] The sales of respondent's Florida branches during 1940 comprised about 46 percent of the total business done by wholesale paper distributors in that State, the remaining 54 percent being divided among 34 other dealers (R. 515–516; see R. 571–572).

dise passes through the branch warehouses before delivery to the customer. Rapidity of turnover and movement are emphasized (R. 375, 424–425, 438–439, 458, 467, 514, 614, 639–640; see R. 300); the goods are "moved through" the branch establishment in the manner usual with wholesale distributors (R. 273). Respondent does not store goods for hire (R. 274).

Five of the branch establishments deliver goods to customers in other States; it is conceded that the Act applies to delivery employees at those establishments (R. 37, 42, 49). The controversy arises with respect to such employees at the seven establishments which, while constantly receiving and distributing to their customers large quantities of extrastate merchandise, do not ship any of it across State lines (R. 38, 43).[3]

Considerable quantities of the merchandise handled at the latter establishments are clearly earmarked for particular customers at the time they are ordered from the extrastate suppliers. A large variety of items is printed at the mill with the name of the customer of respondent who is to use them.[4] Shipments of such printed materials

[3] It was agreed at the trial that operations of the Tampa warehouse could be taken as typical of the "disputed" branches (R. 336–337, 531, 534).

[4] Salesbooks (R. 432), laundry bags (R. 434), glassine or cellophane bags (*id.*), coffee bags (R. 435), wrapping paper and cellulose tape (R. 650), ice cream and cottage cheese containers (R. 436, 650), hat, shoe and clothing boxes (R. 650), and envelopes (R. 405, 650) are in this category.

are received regularly and frequently at the branch establishments (R. 300-302, 374, 432-434). The wide range of unprinted articles handled precludes respondent from carrying all of them in stock; respondent's price catalogue lists many items which are "stocked at the mill." As a frequent and regular part of its business (R. 404, 418, 431-432), respondent accepts orders for these articles which are filled by obtaining them from the extrastate supplier (R. 252, 404, 414, 481-483).

Some of respondent's so-called "stock items" are as clearly earmarked for particular customers. The *Tampa Record Press* is the only taker of a certain size of newsprint, a carload of which moved to the Tampa branch semi-monthly (R. 469, 470, 612-621, 665, 672). Each week respondent delivered 4,000 pounds of fruit box label paper to the Fruit Growers Press; no other customer used this paper and respondent ordered it for the specific purpose of filling orders of the Fruit Growers Press as they were received (R. 359, 473, 617-618, 622, 674).[5] At the time of the hearing, the Tampa branch was preparing to begin periodic deliveries totalling 3 million ice cream cups to the Poinsetta

[5] During the 1939-1940 citrus-fruit season, respondent delivered to Fruit Growers Press 10,000 pounds of such paper, a sufficient quantity to print 1½ million labels; during the following season this quantity increased several times (R. 362-364).

Dairy; the cups were to be manufactured in Connecticut (R. 388–389, 391). The record contains other examples of purchases by respondent to meet the unique requirements of particular customers.[6]

The customers of each branch establishment constitute a stable group; their orders on each regular visit of respondent's salesmen are recurrent as to kind and amount of merchandise (R. 370–371, 373–374, 381, 395–396, 410–411, 438). Before placing his orders, the branch manager has "a pretty good idea" where and when the merchandise will be sold (R. 373, 384, 396, 411, 438); he can estimate with precision, on the basis of past experience, the immediate needs of his trade (R. 438–439, 456).

Almost daily orders are received by respondent for "stock items" whose supply is exhausted (R. 610–611). Respondent orders the merchandise from outside the state and passes it on to the customer immediately upon receipt (R. 439, 440, 458, 465, 481–482, 640, 670, 671). The employee unload-

[6] The Purity Ice Cream Company used an ice cream cup of a special size; respondent delivered the cups periodically in 5,000 and 10,000 cup lots (R. 644–645). The Peninsular Telephone Company was the only customer for "Atlantic Bond" paper in 250-pound rolls; respondent made semi-weekly deliveries (R. 615–616, 622, 652, 655, 673). The Poinsetta Dairy took 250,000 cottage cheese containers manufactured in New Jersey (R. 387–388, 395). All of these examples are from the operations of the Tampa branch, which was taken as typical of the disputed branches (*supra*, note 3, p. 5).

ing the freight car has in his possession the orders to be filled from the incoming merchandise. (R. 453).

The District Court held that none of respondent's employees at the seven branch establishments in dispute were subject to the Act (R. 707–711). The Circuit Court of Appeals reversed and remanded the cause to the District Court for the entry of "a new decree in accordance with the opinion of this Court" (R. 746). In its opinion the Circuit Court of Appeals held, as to the seven establishments: (a) that the employees engaged in the procurement and receipt of goods from other states are "engaged in commerce" within the meaning of the Act (R. 744); (b) that, with the single exception of the delivery of goods in fulfillment of "prior orders" taken before respondent purchased the goods in another State, the distribution of goods from the branches is not interstate commerce and the employees engaged in such distribution are not within the scope of the Act (*id.*).

REASONS FOR GRANTING THE WRIT

1. The question involved in the present case is now before the Court in *Higgins* v. *Carr Brothers Co.*, No. 97, certiorari granted, June 8, 1942, an action by an employee pursuant to Section 16 (b) of the Act. Since the Government has not participated in the *Higgins* case, and since in our view

the record therein is unilluminating in significant respects, it seems appropriate that our position be stated in the context of the present record.[1]

2. The case involves an important question in the administration of the Fair Labor Standards Act. The interpretation of the phrase "engaged in commerce" (Sections 6, 7, *infra*, pp. 15–16)

---

[1] The Government will also file a petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Seventh Circuit in *Walling* v. *Goldblatt Bros., Inc.*, 5 Wage Hour Rept. 513 (1942). That decision also involves the question presented herein and the record supplements the present one in respects which may prove helpful to the Court.

In addition to the *Goldblatt* and *Higgins* decisions and that in the instant case, the following decisions, most of which were reached on records of doubtful adequacy or on the pleadings, are contrary to the Administrator's interpretation: *Jax Beer Co.* v. *Redfern*, 124 F. (2d) 172 (C. C. A. 5); *Swift & Co.* v. *Wilkerson*, 124 F. (2d) 176 (C. C. A. 5); *Super-Cold Southwest Co.* v. *McBride*, 124 F. (2d) 90 (C. C. A. 5); *General Tobacco & Grocery Co.* v. *Fleming*, 125 F. (2d) 596 (C. C. A. 6); *Jewel Tea Co.* v. *Williams*, 118 F. (2d) 202 (C. C. A. 10); *Gerdert* v. *Certified Poultry & Egg Co.*, 38 F. Supp. 964 (S. D. Fla.); *Eddings* v. *Southern Dairies*, 42 F. Supp. 664 (E. D. S. C.); *Veazey Drug Co.* v. *Fleming*, 42 F. Supp. 689 (W. D. Okla.); *Duncan* v. *Montgomery Ward & Co.*, 42 F. Supp. 879 (S. D. Tex.); *Walling* v. *Silver Bros. Co., Inc.*, 5 Wage Hour Rept. 533 (D. N. H. 1942); *Rauhoff* v. *Henry Gramling & Co.*, 42 F. Supp. 754 (E. D. Ark.); *Brown* v. *Bailey*, 147 S. W. (2d) 105 (Tenn. 1941).

The Administrator's interpretation was sustained in *Fleming* v. *Alterman*, 38 F. Supp. 94 (N. D. Ga.); *Fleming* v. *American Stores Co.*, 42 F. Supp. 511 (E. D. Pa.) pending on appeal; *Gavril* v. *Kraft Cheese Co.*, 42 F. Supp. 702 (N. D. Ill.).

adopted by the Circuit Court of Appeals represents an unduly narrow reading of this familiar exercise of federal power, and as applied to the Fair Labor Standards Act would exclude from the coverage of the Act many thousands of employees who are entitled to its benefits.

Enterprises such as respondent's occupy, in our view, an intermediate, not a terminal, position in the interstate flow of commerce, constituting a "convenient step in the process of getting it to its final destination." *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 309. They draw from all parts of the nation enormous quantities of goods for the sole purpose of distributing to their customers, largely industrial and commercial in character (see R. 511–512). Their only function is to serve as a medium through which large scale sources of supply meet a nation-wide demand. The fortuitous[*] circumstance that the final delivery of goods by the intermediate wholesaler sometimes takes place wholly within the confines of a single State cannot deprive the last step in the distribution process of its interstate character. The assembling of goods for movement out of the State is a part of interstate commerce although State lines

[*] The area served is, plainly, delimited by economic considerations, not by State boundaries. Thus, five of respondent's branches find it feasible and profitable to supply customers in several States, while seven branches deliver goods only within the same State (*supra*, p. 5).

are yet to be crossed;[9] the distributive movement in the State of destination bears at least an equally direct relation to the nation's commerce. Cf. *Local 167* v. *United States*, 291 U. S. 293, 297; *Schechter Corp.* v. *United States*, 295 U. S. 495, 542–543.[10]

It does not accord with fact to view these large-scale distributors as local merchants who bring goods from other states and hold them for local sale (see R. 744). Although goods move through respondent's branches with rapidity, due to precise anticipation of customers' demands in terms of time and quantity which the nature of the business permits, the court below held that the goods "come to rest" when they are received at respondent's branches.[11] The concept of respondent's branch establishments as dams, separating

[9] *Currin* v. *Wallace*, 306 U. S. 1; *Mulford* v. *Smith*, 307 U. S. 38; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 290; *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189, 198.

[10] In the *Schechter* case commission men, occupying a position equivalent to that of respondent here, received poultry from outside the state and sold it to slaughterers, including the Schechters. The Court held that when the Schechters purchased poultry at the market in New York City and it was trucked to their slaughterhouses "the interstate transactions in relation to that poultry then ended" (at pp. 542–543), in other words at the place of business of the purchaser from the importer.

[11] The sole exception to this holding concerns goods which are brought into the State by respondent for the purpose of filling a prior order from a customer and the goods "are shipped interstate with the definite intention that those goods be carried at once to that customer and they are so carried * * *" (R. 744; see *infra*, p. 13).

an interstate flow from its intrastate continuation, is essentially arbitrary. This is demonstrated by the evasion which it permits. Formerly, to meet orders which could not be supplied from stock, respondent's trucks picked up goods from the interstate carrier, drove into the yard of the branch warehouse for checking of the load, and proceeded immediately to the customer's place of business without unloading of the goods (R. 376–378, 453, 671).[12] Beset by litigation (R. 462), respondent invited application of the "come to rest" theory; the goods were unloaded, brought just inside the warehouse door, reloaded, and sent on to the customer. (R. 378–379, 453–454, 459–461, 640). Although this fleeting touch of the warehouse floor did not subject the interstate movement even to "the interruption necessary to find a purchaser" (*Swift & Co.* v. *United States*, 196 U. S. 375, 399), under the decision below it apparently serves to terminate the national concern in the subsequent movement and to transmute into the terminal leg of the interstate journey the formerly intermediary movement from the carrier to respondent.

The Circuit Court of Appeals sharply differentiated one kind of transaction in which alone, it held, the requisite intended destination at a point beyond respondent's branches was shown, namely

[12] This occurred some three times weekly at the Tampa branch (R. 458–459).

the bringing of goods into the State for the specific purpose of filling a prior order (R. 744). But the distinction is excessively formal, and has been rejected by this Court on the side of state power as "without the support of reason or authority." *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 54. The allocation of particular goods or quantities of goods to particular customers is equally clear in other instances. Where the demand for a certain "stock item" is unique to a single taker (*supra*, pp. 6–7), there can be no doubt that the shipment is intended for him. And since the orders of respondent's industrial and commercial customers are recurrent in time and amount, respondent has "a pretty good idea," when it makes up its orders on the basis of these demands, where particular quantities will be taken (*supra*, p. 7). The resultant shipments into the State are "for the retailer" or other customer, we submit, no less than in *Federal Trade Commission* v. *Pacific States Paper Assn.*, 273 U. S. 52, 63–64),[13] so that the interstate commerce does not end at the respondent's establishments.

[13] We do not mean to imply that respondent knows that a particular case of napkins in a shipment will go to a certain customer (see R. 385). It does know that, barring unusual contingencies, a certain group of customers will absorb the entire shipment (*supra*, p. 7). It is sufficient that upon receipt "the portion intended for the purchaser is turned over to him." *Pacific States Paper* case, *supra*, at p. 60. And the possibility of diversion from the intended taker to another is immaterial. *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 55.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

WARNER W. GARDNER,
Solicitor, United States Department of Labor.

AUGUST 1942.

APPENDIX

Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C., sec. 201 *et seq.*):

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

* * * * *

SEC. 3. (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

* * * * *

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods

for commerce wages at the following rates—* * *

* * * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—* * *

U. S. GOVERNMENT PRINTING OFFICE: 1942